



California Fair Political Practices Commission

April 12, 1988

Thomas J. Harron
City Attorney
City of Chula Vista
276 Fourth Avenue
Chula Vista, CA 92010

Re: Your Request for Advice
Our File No. G-88-121

Dear Mr. Harron:

We are in receipt of your request for advice regarding Councilmember David Malcolm's duties under the conflict-of-interest provisions of the Political Reform Act ("the Act").^{1/}

In your request letter you point out that the Act gives any person the right to request formal written advice of the Commission relative to his or her duties under the Act. (Section 83114.) Further, you state that Section 82047 defines "person" to include a group of persons acting in concert. Thus, it could be argued that the city council constitutes a "person", and may request advice concerning its duties under the Act.

While we agree with your argument as a general proposition, it does not entitle the city council to formal written advice in this situation. Your request for advice turns on the activities and duties of only one member of the city council, rather than the entire council, and the public official who is the subject of your inquiry has refused to give his authorization for your request. Moreover, it appears that there are material facts in dispute which are unavailable to you at this time.

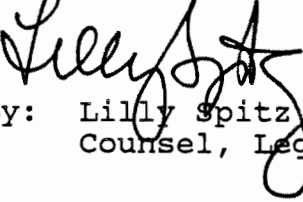
^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, *et seq.* All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

Thomas J. Harron
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Due to these circumstances, your request for advice is declined pursuant to Regulation 18329(b)(8)(B), (C), (c)(4)(C), (F) (copy enclosed).

Sincerely,

Diane M. Griffiths
General Counsel


By: Lilly Spitz
Counsel, Legal Division

DMG:LS:plh



OFFICE OF THE CITY ATTORNEY

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March 14, 1988

Fair Political Practices Commission
P. O. Box 807
Sacramento, Ca. 95804

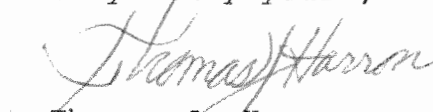
Dear Sir or Madam:

Enclosed is a letter which the Chula Vista City Council directed me to send to the FPPC at its meeting on March 3, 1988. Although the letter is dated March 14, 1988, it was actually drafted on March 4 and sent to Dan Stanford, Councilman Malcolm's attorney in this matter.

There have been two developments since the letter was drafted. First, the City Council directed me to request that you give a priority to the question of conflict of interest on Rancho Del Sur. If you were to reach a decision on this matter prior to reaching any decision on the Bayfront question, the Council would appreciate it if you could release the opinion on Rancho Del Sur. Second, Councilman Malcolm has informed me that he will not join in this request and has officially withdrawn his request for advice from the Commission with respect to Rancho Del Sur. While the City Council had hoped that Councilman Malcolm would join in its request, I was directed to seek this advice unilaterally should that not occur.

We would appreciate your consideration and advice on this matter.

Very truly yours,



Thomas J. Harron
City Attorney

TJH:lgk
3959

cc: City Council
City Manager



OFFICE OF THE CITY ATTORNEY

March 14, 1988

Fair Political Practices Commission
P. O. Box 807
Sacramento, Ca. 95804

Dear Sir or Madam:

The Chula Vista City Council has directed me to request an advice letter from the FPPC. The Council would like advice as to whether one of its members, Councilman David Malcolm, may participate in future decisions dealing with Chula Vista's Bayfront Plan and a final map approval for a development known as Rancho Del Sur/Sunbow. At the time this letter is drafted, Councilman Malcolm has not joined the Council in this request, but he will be requested to do so.

It is our understanding under Government Code Section 83114 that any "person" may request the Commission to issue an opinion with respect to his duties under this title. Under Section 82047, a "person" is broadly defined to be mean any organization or group of persons acting in concert. The City is concerned particularly in light of the recent Downey Cares v. Downey Community Development Commission case (196 C.A.3d 983, 242 Cal.Rptr. 972) that its future actions on these matters are valid.

Both questions arise out of the same factual background. On March 26, 1985, Councilman Malcolm and Robert Penner entered into a 70 year lease with Metropolitan Properties, Inc. to lease approximately 14 acres of property on Broadway adjacent to the proposed Sweetwater Flood Control Channel. The lease required Malcolm and Penner to pay \$70,000 per year to Metropolitan Properties.

On May 15, 1985, Mr. Penner and Councilman Malcolm subleased the property to National Avenue Associates, a partnership made up of William Patrick Kruer, Matthew Loonin, George Kruer and Jerald Alford. The sublessees paid one month's rent to Penner and Malcolm and thereafter paid the rent directly to Metropolitan Properties. The sublease included a contingent benefit whereby when building permits were drawn, the sublessees would be obliged to pay Councilman Malcolm and Mr. Penner an additional \$70,000 per year.

On June 1, 1985, Councilman Malcolm transferred 40% of his contingent benefit to Robert Penner and 60% to Sonia Khoubesserian. (See Exhibit A.) This transfer states that is is for "valuable consideration". The consideration from Khoubesserian was a wedding gift given some time in the 1970's. The consideration from Mr. Penner was never spelled out.

According to Councilman Malcolm's annual disclosure statement, he received over \$10,000 a year in 1985 and 1986 from Penner's medical/surgical group. On June 3, 1987, the property owner released Councilman Malcolm from any liability or obligation arising out of the lease. (See Exhibit B).

Chula Vista is presently involved in two lawsuits involving its Bayfront. One is Sierra Club v. the Coastal Commission with Chula Vista as the real party in interest, which challenges the Coastal Commission's approval of Chula Vista's Local Coastal Plan. The other lawsuit is Sierra v. March which challenges a federal project including the Sweetwater Flood Control Channel for failure to provide adequate mitigation. The main issue in both lawsuits is the same, that is, the proposed development of Gunpowder Point. A federal judge has enjoined further work on the federal project so the Sweetwater Flood Control Channel is in jeopardy. Most decisions involving the Bayfront revolve around the question of whether the City should give up its development plans for Gunpowder Point in order to resolve the lawsuits and, therefore, assure completion of the Flood Control Channel.

The subject property borders on the Flood Control Channel. It is estimated that the flow of water adjacent to the subject property would reach 34,000 cubic feet per second. In its current state, the project would only be able to handle approximately 20,000 cubic feet per second. This means that the property will be subject to flooding and completion of the channel would presumably be a material benefit to the property.

Three of the four partners involved in National Avenue Associates (Kruer, Loonin and Kruer) are also involved in the Rancho Del Sur Subdivision. Rancho Del Sur is a large residential subdivision involving Great American Bank, John Gardner and Don Gardner and the three members of National Avenue Associates.

This factual scenario raises several questions with regard to conflict of interest:


1. Does the payment of \$70,000 a year by sublessee, National Avenue Associates, to the property owner on the Flood Control Channel constitute income to the

sublessors, Councilman Malcolm and Mr. Penner? If it does, does the release entered into on June 3, 1987 result in Councilman Malcolm being prohibited from participating in decisions that would affect the property for twelve more months to June 3, 1988?

2. Would Councilman Malcolm be prohibited from participating in decisions on the Bayfront because he receives income from Mr. Penner and Mr. Penner has an interest in the Flood Control Channel property as lessee, sublessor and beneficiary of the contingent benefit?
3. If the sublessees rent payments constitute income to Councilman Malcolm, is he then also prohibited from voting on Rancho Del Sur because three of the four sublessees are involved in the project?
4. Did the document purporting to transfer Councilman Malcolm's interest in the contingent benefit to Penner and Khoubesserian effectively accomplish that objective so that Councilman Malcolm does not have a further interest in the property along side the Flood Control Channel?

A copy of this letter will be forwarded to Mr. Dan L. Stanford who represents Councilman Malcolm along with a request that he join in this request for advice. Regardless of his position, the Council would appreciate advice from the FPPC on this matter so that it will be able to act in a way that is consistent with its obligations under the Political Reform Act.

Very truly yours,


Thomas J. Harron
City Attorney

TJH:lgk
3938a
Enc.

AGREEMENT

For valuable consideration Robert Penner, M.D., hereinafter (Penner) and David Malcolm hereinafter (Malcolm) and Sonia Khoubesserian hereinafter (Khoubesserian) agree to the following:

On March 26, 1985 Penner/Malcolm entered into a lease with Metropolitan Properties, Inc., a California corporation for the lease of certain property located in the County of San Diego more fully described in exhibit "A" attached hereto and made a part hereof.

On May 15, 1985 Penner/Malcolm entered into a sublease with National Avenue Associates, a California general partnership on the above referenced property more fully described in attached exhibit "A".

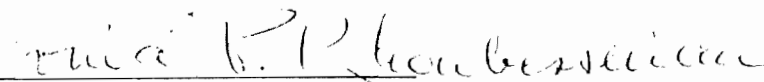
The sublease has a possibility of generating income. All payments (if any) shall be made payable to Robert Penner, M.D. and the monies shall be distributed as follows:

Robert Penner and or his assigns	40% (forty)
David Malcolm	0% (Zero)
Sonia Khoubesserian	60% (Sixty)

Agreed to this first day of June 1985.


Robert Penner


David Malcolm


Sonia Khoubesserian

FIRST AMENDMENT TO GROUND LEASE

This First Amendment to Ground Lease (First Amendment) is made as of June 3, 1987, between METROPOLITAN ~~PROPERTIES~~ ^{SHOPPING} SQUARE, LTD., CHARLES C. KERCH, NANCY W. KERCH, PRISCILLA STADTMILLER, and MARY BROTHERTON KELLEY and GAYLE JEAN STEPHENSON, as Co-Trustees (all as successors in interest to METROPOLITAN PROPERTIES, INC.), and ROBERT PENNER, M.D., for the purpose of amending that certain Ground Lease made as of March 26, 1985, between METROPOLITAN PROPERTIES, INC., as Lessor, and ROBERT PENNER, M.D., and DAVID MALCOLM, as Lessee, as follows:

1. David Malcolm is released from all liability and obligation under the Ground Lease, and from and after the date hereof he shall have no responsibility with respect thereto; all references in the lease to Lessee shall hereafter be deemed to refer only to Robert Penner, M.D.

2. William Patrick Krueer, a general partner of National Avenue Associates (which general partnership has subleased the property which is the subject of the Ground Lease from said Lessee) shall concurrently herewith execute a Guaranty in favor of Metropolitan Properties Square, Ltd., Charles C. Kerch, Nancy W. Kerch, Priscilla Stadtmiller, and Mary Brotherton Kelley and Gayle Jean Stephenson, as Co-Trustees, in form and content as set forth on Exhibit "A" attached hereto and by this reference made a part hereof.

3. Except as amended or modified hereby, said Ground Lease shall and does remain in full force and effect.

LESSOR:

SHOPPING
METROPOLITAN ~~PROPERTY~~ SQUARE,
LTD.

By: Charles C. Kerch
Charles C. Kerch, General
Partner

Charles C. Kerch
CHARLES C. KERCH

Nancy W. Kerch
NANCY W. KERCH

Priscilla Stadtmiller
PRISCILLA STADTMILLER

Mary Brotherton Kelley
MARY BROTHERTON KELLEY, Trustee

Gayle Jean Stephenson
GAYLE JEAN STEPHENSON, Trustee

LESSEE:

Robert Penner
ROBERT PENNER, M.D.

AGREED AND APPROVED:

David Malcolm
DAVID MALCOLM (Released Party)



California Fair Political Practices Commission

March 25, 1988

Thomas J. Harron
City Attorney
276 Fourth Avenue
Chula Vista, CA 92010

Re: 88-121

Dear Mr. Harron:

Your letter requesting advice under the Political Reform Act was received on March 18, 1988 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Lilly Spitz, an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329).)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

Diane M. Griffiths
General Counsel

DMG:plh
cc: David Malcolm